

Case 2:04-cv-05125-FVS Document 410 Filed 09/11/2006

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THE HONORABLE FRED VAN
SICKLE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JAMES S. GORDON, JR,
a married individual;

Plaintiffs,

v.

IMPULSE MARKETING
GROUP, INC., a
Nevada/Georgia corporation;
JEFFREY GOLDSTEIN,
individually and as part of his
marital community; PHILLIP
HUSTON, individually and as
part of his marital community;
KENNETH ADAMSON,
individually and as part of his
marital community; JOHN
DOES, I-X,

NO. CV-04-5125-FVS

**[SECOND AMENDED]
COMPLAINT FOR DAMAGES UNDER
THE CAN-SPAM ACT OF 2003 [15
U.S.C. §7701, *et seq.*]; WASHINGTON
CONSUMER PROTECTION ACT
(RCW 19.86); THE WASHINGTON
COMMERCIAL ELECTRONIC MAIL
ACT (RCW 19.190); RCW 19.170 *et seq.*,
and Injunctive Relief**

[JURY DEMAND]

COMES NOW, Plaintiff James S. Gordon, Jr. and brings this COMPLAINT
against defendants named herein. Plaintiff alleges the following on information and
belief:

NO. CV-05-5079-FVS
PLAINTIFF'S FIRST AMENDED
COMPLAINT

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1 **1. PARTIES**

2 1.1 Plaintiff James S. Gordon, Jr. ("Gordon") is a married individual who
3 is and was a resident of Benton and/or Franklin County, Washington, and
4 who was doing business as an interactive computer service located on the
5 internet at 'gordonworks.com', during the time of all acts complained of
6 herein.
7

8
9 1.2 Defendant Impulse Marketing Group, Inc., ("Impulse") upon
10 information and belief, is a **Nevada** corporation, with its principle place of
11 business located in Georgia.
12

13 1.3 Defendant Jeffrey Goldstein ("Goldstein") is an employee, officer,
14 director, and/or majority shareholder of Impulse, and as such controls its
15 policies, activities, and practices, including those alleged herein on behalf of
16 or as assistance to Impulse. All acts and practices undertaken by Goldstein
17 on behalf of Impulse and/or on behalf of himself are and were for the benefit
18 of his marital community. Defendant resides in the State of Georgia and
19 transacts or has transacted business in the State of Washington and in the
20 Eastern District of Washington.
21
22

23
24 1.4 Defendant Phil Huston ("Huston") is or was an employee, officer,
25

1 director, and/or majority shareholder of Impulse, and as such controls its
2 policies, activities, and practices, including those alleged herein on behalf of
3 or as assistance to Impulse. All acts and practices undertaken by Huston on
4 behalf of Impulse and/or on behalf of himself are and were for the benefit of
5 his marital community. Defendant resides in the State of Georgia and
6 transacts or has transacted business in the State of Washington and in the
7 Eastern District of Washington.
8

9
10 1.5 Defendant Kenneth Adamson ("Adamson") is an employee, officer,
11 director, and/or majority shareholder of Impulse, and as such controls its
12 policies, activities, and practices, including those alleged herein on behalf of
13 or as assistance to Impulse. All acts and practices undertaken by Huston on
14 behalf of Impulse and/or on behalf of himself are and were for the benefit of
15 his marital community. Defendant resides in the State of Georgia and
16 transacts or has transacted business in the State of Washington, and in the
17 Eastern District of Washington.
18
19
20

21 1.6 The actions alleged herein to have been undertaken by the defendants
22 were undertaken by each defendant individually, were actions of which each
23 defendant had knowledge and that each defendant authorized, controlled,
24

1 directed, or had the ability to authorize, control or direct, and/or were actions
2 each defendant assisted and/or participated in, and are actions for which each
3 defendant is individually liable. Each defendant aided, abetted, assisted, and
4 conspired with the actions of each other defendant herein in that each
5 defendant had knowledge of those actions, provided assistance and benefited
6 from those actions, in whole or in part. Each of the defendants was the agent
7 of each of the other defendants, and in committing those acts herein alleged,
8 was acting within the course and scope of such agency and with the
9 permission and consent of other defendants.
10
11
12

13 II. JURISDICTION

14 2.1 This Court has original jurisdiction of the causes of action herein
15 which are brought under the CAN-SPAM Act of 2003 – 15 U.S.C. §7701, *et*
16 *seq.*, 15 U.S.C. §7707(g)(1).
17

18 2.2 The unlawful actions of the defendants were committed in the States of
19 Washington, Georgia, and in the judicial district of this Court.
20

21 2.3 The Defendants regularly transact business within the State of
22 Washington by virtue of the fact that they regularly send, initiate the
23 transmission of, or assist others in sending, or initiating the transmission of
24

1 commercial bulk emails into the State, which emails are received on
2 computers and other electronic devices owned and maintained by residents of
3 the State in the State. As a result of the Defendants' acts and transactions
4 within the State of Washington, this Court has personal jurisdiction over the
5 Defendants under RCW 4.28.185(1)(a).
6

7
8 2.4 The causes of action complained of herein include allegations that
9 commercial electronic messages sent, or initiated by or with the assistance of
10 the Defendants to the Plaintiff violates RCW 19.190 et seq., the Washington
11 Commercial Electronic Mail Act (CEMA) and RCW 19.86 et seq. the
12 Washington State Consumer Protection Act (CPA).
13

14 2.5 This Court has diversity jurisdiction over the parties named herein as
15 plaintiffs and defendants are residents of different states, and the complaint
16 includes a prayer for relief in excess of \$75,000, exclusive of interest and
17 costs.
18

19
20 2.6 Jurisdiction to commence this action is conferred by 15 U.S.C. §7701,
21 et seq., 15 U.S.C. §7707(g)(1); RCW 19.86.080, 19.86.090, 19.86.160, RCW
22 19.190.030 and RCW 4.12.020-.025.
23

24
25 **III. General Allegations**

26 SECOND AMENDED COMPLAINT
27 FOR DAMAGES, PENALTIES, ETC.

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1 3.1 Plaintiffs reallege and incorporate as though fully set forth herein, all
2 prior paragraphs herein.

3
4 3.2 Plaintiff Gordon is the registrant of the internet domain
5 “gordonworks.com”.

6 3.3 Plaintiff Gordon is the registrant of the internet domain
7
8 ‘gordonworks.com’, and is an interactive computer service as that term is
9 defined in 15 U.S.C. §7703(11); 47 USC 231(e)(4); and RCW 19.190.010
10 (7), and is the owner of an internet domain server, which, among others,
11 hosts the ‘Gordonworks.com’ domain.
12

13 3.4 Gordon provides or enables computer access by multiple users to a
14 computer server that hosts the “gordonworks.com” domain name and further
15 provides electronic mail accounts to individuals utilizing their personal
16 domain names for electronic messaging, including individuals residing
17 within the Federal judicial district in which this case is brought.
18
19

20 3.5 Plaintiff Gordon is a user of the interactive computer service provided
21 by ‘gordonworks.com’, and maintains electronic mail message accounts with
22 ‘gordonworks.com, including under the address jim@gordonworks.com as
23 well as the domain name “rcw19190020.com”.
24

1 3.6 At all times relevant to this action Plaintiff status as Washington
2 residents is and was public knowledge and available to defendants upon
3 request from the Plaintiff, their domain registrar information, and other
4 readily accessible sources.
5

6 3.7 The Defendants have initiated the transmission of numerous
7 commercial email messages directed to and through Plaintiff's interactive
8 computer service, and/or to and through Plaintiff's domain
9 'gordonworks.com', and/or further addressed to Plaintiff Gordon's email
10 addresses, including but not limited to jim@gordonworks.com.
11
12

13 14 **IV. Causes of Action**

15 **4.1 First Cause of Action**

16 **Violations of the Can-Spam Act of 2003 [15 U.S.C. §7701 et seq.]**

17 Plaintiff realleges all preceding paragraphs and incorporates them herein as if set
18 forth in full:
19

20
21 4.1.1 Plaintiff has received thousands of commercial electronic mail
22 messages initiated by defendants, and/or by others on behalf of defendants,
23 and sent to Plaintiff's electronic mail server located in Benton and Franklin
24 Counties, Washington, and/or to its registered domains, including
25

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1 'gordonworks.com' in violation of the CAN-SPAM Act of 2003, 15 U.S.C.
2 §7701 et seq.
3

4 4.1.2 Plaintiff Gordon further alleges that he received numerous items of
5 electronic mail initiated by the defendants, and/or by others on
6 defendants' behalf, and sent to the 'gordonworks.com' domain, and to
7 email addresses served thereby, that were responded to with specific
8 requests not to receive future commercial electronic mail messages, which
9 requests went unheeded for a substantial amount of time during which
10 defendants continued to send unlawful email to plaintiff in violation of 15
11 U.S.C. §7704(a)(4).
12
13

14 4.1.3 Plaintiff further alleges that the defendants initiated, or assisted others in
15 the transmission of, at least one (1) separate item of electronic mail to the
16 plaintiff to an address most likely harvested from domain name registration
17 and/or by other means of anonymous internet information harvesting. Said
18 conduct was in violation of 15 U.S.C. §7704(b)(1)(A)(i), and (ii).
19
20

21 4.1.4 Plaintiff further alleges that defendants and/or others on behalf of
22 defendants initiated the transmission of commercial electronic mail to
23 plaintiff at and through his 'gordonworks.com' domain, and to individual
24
25

1 email accounts at that domain and on its server, which electronic mail
2 included materially misleading subject lines, which constitutes a violation of
3 15 USC 7704(a)(2).
4

5 4.1.5 Plaintiff further alleges that defendants initiated, and/or assisted others
6 in initiating the transmission of commercial electronic mail to plaintiff at and
7 through the 'gordonworks.com' domain and to individual email accounts
8 served thereby, which electronic mail failed to provide a functioning
9 mechanism, clearly and conspicuously displayed, that a recipient may use, in
10 a manner specified in the message, to request not to receive further messages
11 from the sender, which constitutes violations of 15 USC 7704(a)(3)(A), and
12 7704(a)(4)(A)(ii).
13
14
15

16 4.1.6 Plaintiff further alleges that defendants initiated and/or assisted others
17 in initiating the transmission of commercial electronic mail to plaintiffs at and
18 through the 'gordonworks.com' domain to individual email accounts served
19 thereby, which electronic mail failed to provide clear and conspicuous notice
20 that the mail is an "advertisement", which constitutes a violation of 15 USC
21 7704(a)(4)(A)(i).
22
23

24 4.1.7 As a proximate result of said unlawful conduct by said defendants,
25

1 Plaintiff is entitled to damages for the actual monetary loss incurred or
2 statutory damages in the amount of up to \$100.00 in the case of violation of
3 Section 5(a)(1) or up to \$25.00 in the case of each violation of the other
4 subsections of Section 5 in the form of statutory damages as set forth in 15
5 U.S.C. §7707(g)(1) and (3)(A).
6

7
8 4.1.9 Plaintiff furthermore seeks a preliminary and permanent injunction
9 against the defendants for their current and future violations of the CAN-
10 SPAM Act of 2003 as it and members of the general public will continue to
11 incur damages as a result of the unlawful conduct of said defendants. The
12 seeking of injunctive relief by the plaintiff is specifically authorized by 15
13 U.S.C. §7707(g)(1)(A).
14

15
16 4.1.6 Plaintiff furthermore seeks their attorney fees and costs against the
17 defendants pursuant to 15 U.S.C. §7707(g)(4).
18

19 4.2 Second and Third Causes of Action

20
21 **Violations of the Washington CEMA [RCW 19.190.020 et seq.]**

22 **and the Washington Consumer Protection Act [RCW 19.86 et seq.]**

23 Plaintiffs reallege all preceding paragraphs and incorporates them herein as if set
24 forth in full:
25

26 SECOND AMENDED COMPLAINT
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1 4.2.1 It is a violation of RCW 19.190.020(1)(a)(b) and 19.190.030(1)(a)(b)
2 to initiate the transmission, conspire with another to initiate the transmission,
3 or assist the transmission, of a commercial electronic mail message from a
4 computer located in Washington or to an electronic mail address that the
5 sender knows, or has reason to know, is held by a Washington resident that
6 uses a third party's internet domain name without permission of the third
7 party, or otherwise misrepresents or obscures any information in identifying
8 the point of origin or the transmission path of a commercial electronic mail
9 message, or contains false or misleading information in the subject line.
10

11
12
13 4.2.2 Defendants initiated the transmission, or assisted and/or conspired to
14 transmit numerous commercial electronic mail messages to Plaintiff's
15 domain and server, and to Plaintiff Gordon's individual email account which
16 defendants knew, or had reason to know were located in the state of
17 Washington, which emails misrepresented or obscured information
18 identifying the point of origin or the transmission path, and/or which
19 contained false or misleading information in the subject line, which
20 constitutes violations of RCW 19.190 et seq.
21
22
23

24 4.2.3 It is further a violation of RCW 19.190.080 to "solicit, request, or take
25

1 any action to induce a person to provide personally identifying information
2 by means of a web page, electronic mail message, or otherwise using the
3 internet by representing oneself, either directly or by implication, to be
4 another person, without the authority or approval of such other person.”

5 Numerous emails sent by Defendants and received by Plaintiff violated this
6 provision of the CEMA.
7

8
9 4.2.4 Pursuant to RCW 19.190.020(1)(a)(b), each email sent in this Second
10 Cause of Action is a separate and distinct violation of RCW 19.190, and
11 pursuant to RCW 19.190.030(1)(a)(b), (2), and (3) constitutes a separate and
12 distinct violation of the Consumer Protection Act, RCW 19.86.
13

14 4.2.5 Further, defendants’ acts herein alleged, constitute separate and
15 distinct violations of RCW 19.86 as they constitute unfair or deceptive acts
16 and practices, occurring in the regular course of defendants’ conduct of
17 commerce and trade, and are unfair methods of competition, which acts have
18 been, or are likely to be perpetrated against other residents of the State.
19
20

21
22 Plaintiff has been damaged as a result of Defendants’ statutory violations as
23 set forth herein, in an amount to be proven at trial.
24

25
26 SECOND AMENDED COMPLAINT
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4.3 Fourth Cause of Action**RCW 19.170 et seq.**

Plaintiff realleges all preceding paragraphs and incorporates them herein as if set forth in full:

4.3.1 RCW 19.170 et seq. makes it unlawful under Washington State law to deceptively advertise or promote “free” prizes, gifts, awards, travel coupons or certificate, free item, or any other item offered in a promotion that is different and distinct from the goods, service, or property promoted by a sponsor. The statute makes a violation of RCW 19.170 a per se violation of the State Consumer Protection Act (RCW 19.86 et seq.)

4.3.2 Numerous email advertisements, i.e., “spam” which Defendants transmitted to Plaintiff, as described herein, violated RCW 19.170 et seq., in the following ways: In violation of RCW 19.170.030:

- (a) The offending emails contained offers, and promotions for prizes, gifts, and awards which failed to identify the name and address of the promoter and the sponsor of the promotion; and/or,
- (b) failed to state the verifiable retail value of each prize offered in it; and/or,
- (c) failed to disclose the verifiable retail value and odds for each prize which must be stated in immediate proximity on the same

1 page with the first listing of each prize in type at least as large as
2 the typeface used in the standard text of the offer; and/or

3 (d) failed to conspicuously disclose, if a person is required or
4 invited to view, hear, or attend a sales presentation in order to
5 claim a prize that has been awarded, may have been awarded, or
6 will be awarded, the requirement or invitation must be
7 conspicuously disclosed under subsection (7) of this section to
8 the person in the offer in bold-face type at least as large as the
9 typeface used in the standard text of the offer; and/or,

10 (e) or failed to otherwise comply with RCW 19.170.030 which
11 requires that "No item in an offer may be denominated a prize,
12 gift, award, premium, or similar term that implies the item is
13 free if, in order to receive the item or use the item for its
14 intended purpose the intended recipient is required to spend any
15 sum of money, including but not limited to shipping fees,
16 deposits, handling fees, payment for one item in order to receive
17 another at no charge, or the purchase of another item or the
18 expenditure of funds in order to make meaningful use of the
19 item awarded in the promotion. The payment of any applicable
20 state or federal taxes by a recipient directly to a government
21 entity is not a violation of this section."

22 In violation of RCW 19.170.040:

23 (a) included a prize in an offer when the promoter or sponsor knows
24 or has reason to know that the prize will not be available in a
25 sufficient quantity based upon the reasonably anticipated
26 response to the offer.

27 (b) failed to comply with subsection (5) which provides: "If the
28 prize is not available for immediate delivery to the recipient, the
recipient shall be given, at the promoter or sponsor's option, a
rain check for the prize, the verifiable retail value of the prize in
cash, or a substitute item of equal or greater verifiable retail
value."

- 1 (c) failed to comply with subsection 5(b), which provides: "If the
2 rain check cannot be honored within thirty days, the promoter or
3 sponsor shall mail to the person a valid check or money order
4 for the verifiable retail value of the prize described in this
5 chapter."
6
7 (d) failed to comply with subsection (6), which provides: "A
8 sponsor shall fulfill the rain check within thirty days if the
9 person named as being responsible fails to honor it."
10
11 (e) failed to comply with subsection (7) , which provides: "The
12 offer shall contain the following clear and conspicuous
13 statement of recipients' rights printed in type at least as large as
14 the typeface used in the standard text of the offer:" If you
15 receive a rain check in lieu of the prize, you are entitled by law
16 to receive the prize, an item of equal or greater value, or the cash
17 equivalent of the offered prize within thirty days of the date on
18 which you claimed the prize."
19
20 (f) failed to comply with subsection (8) , which provides: "It is a
21 violation of this chapter to misrepresent the quality, type, value,
22 or availability of a prize."

23 4.3.3 On at least one occasion, Plaintiff attempted to claim a free prize.

24 4.3.4 No free prize was ever received. Instead, Plaintiff received a torrent of
25 spam that has not ended to this day.

26 4.3.5 Plaintiff was damaged thereby.

27 5. **Demand for jury.** Plaintiff demands that this cause be tried to a jury.

PRAYER FOR RELIEF

Plaintiff prays for relief as follows:

That the Court adjudge and decree that defendant has engaged in the conduct complained of herein.

That the Court adjudge and decree that the conduct complained of herein constitutes violations of the Federal Can-Spam Act of 2003, 15 U.S.C. §7705, and that Plaintiff are entitled to all damages provided for thereunder, as may be proved at trial;

That the Court adjudge and decree that the conduct complained of herein constitutes violations of the Washington Commercial Electronic Mail Act, RCW 19.190 et seq., and that Plaintiff is entitled to all damages provided for thereunder, as may be proved at trial, including but not limited to treble damages of up to three times the per statutory damages provided therein for each violation committed by the defendants, in an amount to be proven at trial;

That the Court adjudge and decree that the conduct complained of herein constitutes violations of RCW 19.170 et seq. and that Plaintiff is entitled to all damages provided for thereunder, as may be proved at trial, including but not limited to aggravated damages under RCW 19.170.060 of up to three times the

1 amount of statutory damages for these violations committed by the defendants
2 willfully and knowingly, and for defendants' unlawful activity.

3
4 That the Court adjudge and decree that the conduct complained of herein
5 constitutes violations of the Washington Consumer Protection Act, RCW
6 19.86 et seq., and that Plaintiff is entitled to all damages provided for
7 thereunder, as may be proved at trial;
8

9 That the Court assess civil penalties, pursuant to 19.190.040(1) of five
10 hundred dollars (\$500) per violation against defendant for each and every one
11 of the commercial electronic mail messages sent to plaintiff Gordon in
12 violation of RCW 19.190.020.
13

14 That the Court assess civil penalties, pursuant to 19.190.040(1) one thousand
15 dollars (\$1,000) per violation against defendant for each and every one of the
16 commercial electronic mail messages sent through plaintiff Gordon's
17 interactive computer service in violation of RCW 19.190.020.
18
19

20 That the Court assess civil penalties in the way of treble damages pursuant to
21 RCW 19.86.140, of two thousand dollars (\$2,000) for each and every one of
22 the violations of RCW 19.86 caused by the conduct complained of herein.
23

24 That the Court enter judgment pursuant to RCW 19.86.140 providing that
25

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1 Plaintiff has been injured by the conduct complained of herein, and ordering
2 that Plaintiff recover from the defendant the costs of this action, including
3 reasonable attorney's fees.
4

5 That the Court order such other relief as it may deem just and proper to fully
6 and effectively remedy the effects of, and prevent future instances of, the
7 conduct complained of herein, or which may otherwise seem proper to the
8 Court.
9

10 DATED this 11th day of September, 2006.
11

12 **MERKLE SIEGEL & FRIEDRICHSEN, P.C.**
13

14 /s/ Robert J. Siegel
15 Robert J. Siegel, WSBA #17312
16 Attorneys for Plaintiffs
17
18
19
20

21 **Certificate of Service**
22

23 I, hereby, certify that on September 11, 2006, we filed this pleading with
24 this Court. The Clerk of the Court will provide electronic notification
25

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1 system using the CM/ECF, which will send an electronic copy of this
2 Notice to: Floyd E. Ivey, Peter Glantz, Sean Moynihan, and all counsel
3 of record herein.
4

5
6
7 /S/ Robert J. Siegel
8 Robert J. Siegel, WSBA #17312
9 Attorneys for Plaintiffs
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